ORIGINAL

Supreme Court, U.S.
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RESPONSE REQUIRED

IN THE UNITED STATES SUPREME COURT

STATE OF ALABAMA,)
Petitioner,)
vs.) CASE NO. 90-444
JERRY RAY CARRELL,)
Respondent.)

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent, by and through counsel, and moves this Honorable Court for leave to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules stating in support as follows:

1. Respondent is without the necessary funds to pay the costs of these proceedings. Respondent has been unable to pay the retainer of his attorney for this appeal nor has he been able to acquire the funds to pay for printing the brief. See affidavit attached hereto.

2. Respondent is employed with a net salary of $160.00 per week. Said sum is not even able to support his family.

3. Respondent has been unable to pay his utility bills resulting in the cut-off of his telephone and temporary use of power in his home.

4. Respondent has purchased his mother's home within the

last year. Said home does not have any equity in it that can be borrowed against to acquire any funds for payment of this appeal process.

5. Respondent does not own anything of value that can be sold to acquire said funds.

WHEREFORE, Respondent respectfully moves this Honorable Court for leave to proceed in forma pauperis for the above stated reasons.

Respectfully submitted,

THOMAS M. HAAS
N. RUTH HAAS
Attorneys for Respondent
258 State Street
Mobile, Alabama 36603
(205) 432-0457

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the Honorable Joseph Marston, Assistant Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130, by depositing a copy of same in the United States mail, properly addressed and postage prepaid on this the 4th day of December, 1990.

THOMAS M. HAAS

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,	)	
Petitioner,	)	
vs.	)	CASE NO. 90-444
JERRY RAY CARRELL,	)	
Respondent.	)	

AFFIDAVIT

Personally appeared before me, the undersigned Notary Public, in and for said county in said state, JERRY RAY CARRELL, who, being first duly sworn, did depose and say as follows:

1. I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay any fees or costs, I state that because of my poverty I am unable to pay the cost of said proceeding, and I am unable to pay anything toward the fee of my attorney.

2. I am presently employed, bringing home the approximate sum of $160.00 per week.

3. I do not receive any other income from a business, profession or other form of self-employment.

4. I do not have any monies in checking or savings accounts.

5. I purchased and moved into my mother's home about one year ago but said home does not have any equity in it to borrow

against to acquire the funds to pay for these proceedings.

6. I do not own anything else of value that could be sold to acquire these funds.

7. I have a wife and a young son who are dependent on me for support.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this the 5th day of November, 1990.

JERRY RAY CARRELL

Sworn and subscribed to before me on this the 5th day of November, 1990.

Notary Public, Mobile County, AL

ORIGINAL

NO. 90-444

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STATE OF ALABAMA,

Petitioner,

vs.

JERRY RAY CARRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION

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NOVEMBER TERM, 1990

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vs.

JERRY RAY CARRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION

STATEMENT OF THE CASE

The Respondent was initially arrested in August, 1984; he appeared in a lower court for a preliminary hearing on the charges against him of two counts of first degree sexual abuse and one count of second degree sexual abuse. The charges were nol prossed on motion of the State of Alabama.

Following dismissal of the charges, the Respondent was indicted November 18, 1985, for the same offenses. The sheriff's department attempted to arrest or serve the Respondent on two occasions: November 19, 1985, and in March, 1987. On August 6,

1987, the Respondent was arrested on the charges in the indictment at his work place, where he had worked for eighteen (18) years, and where he had previously been arrested in August, 1984, for the same offenses.

The Respondent entered a plea of not guilty on August 17, 1987, and a plea of not guilty by reason of a mental defect on September 16, 1987. He filed a motion to dismiss raising his denial of a speedy trial on September 16, 1987. After a February 8, 1988, hearing, the motion was denied on February 11, 1988. The Respondent entered a plea of guilty without waiving his right to appeal his "speedy trial" denial on April 7, 1988.

The Respondent filed a motion for new trial on May 18, 1988, stating the parties had agreed that Respondent could take an appeal of the trial court's denial of Respondent's motion to dismiss and noting the record was unclear on this matter. On July 1, 1988, the new trial motion was granted and the Respondent entered a guilty plea and was convicted.

On September 1, 1988, the July 1 conviction was set aside and the Respondent pleaded not guilty; upon conviction he again reserved the right to appeal the trial court's denial of the motion to dismiss. On September 8, 1988, the Respondent filed a written notice of appeal.

A. THE DELAY IN SERVING THE RESPONDENT.

The sheriff's department was negligent in its efforts to serve the arrest warrant on Respondent between his November, 1985, indictment and his August, 1987, arrest. On November 19, 1985, the sheriff's department made its first attempt. Deputies testified the warrant was returned because the Respondent's address was inaccurate. However, the record indicates that the Respondent had resided on Dewitt Avenue in his own home for several years and had previously lived in his mother's house immediately next door on Dewitt Avenue, where she had lived for forty (40) years. (TR. p. 4).

Some evidence indicates a second attempt may have been made to serve or arrest the Respondent in March, 1987.

Finally, the Respondent was arrested at work on August 7, 1987, twenty-one (21) months following his reindictment. Although the Respondent had worked in the same place for eighteen (18) years and had previously been arrested there by the sheriff's department in 1984 for the same offenses, no effort was made to serve him there in the twenty-one (21) months prior to his arrest.

From the record, it is clear, far from "actively" seeking the Respondent as the State claims, the sheriff's department made little effort to serve or arrest the Respondent and avoid the delay which resulted in this case. Deputy Paul, who attempted to serve the Respondent in November, 1985, testified that he did not

check sheriff's records on the Respondent and did not knock on any doors or make any inquiries on Dewitt Avenue. (TR. p. 18-21).

It is difficult to imagine an individual easier to locate than the Respondent. He lived and worked in the same places for many years and had previously been arrested at his place of work by the very department responsible for serving his subsequent arrest warrant. The Alabama Supreme Court rightfully held that the State's minimal efforts to serve the Respondent were negligent. It is appalling that the State of Alabama concludes that such negligence would be a fact in any case. (Pet. at p. 41). Contrary to the State's assertion that:

> " * * *it will always be possible to point to other things they could have and should have done,"

only will it be possible where, as here, the State is negligent in a minimal effort to serve a defendant over a long period of time resulting in an unreasonable and inexcusable delay and depriving a defendant of his fundamental right to a speedy trial.

B. PREJUDICE RESULTING FROM THE DELAY

The Respondent's conviction occurred more than four years after he was originally indicted and almost three years after his reindictment on the same charges. The Respondent raised the denial of his right to a speedy trial at the earliest

opportunity, in his September, 1987, motion to dismiss and reiterated it at every opportunity, reserving the right to appeal the denial when entering guilty pleas and upon conviction. Further, the Respondent testified that while he remembered the accusations and part of the offenses, he did not remember everything involved that had happened or all that he had stated to police officers. (Tr. p. 6-7).

Further, when a delay is excessive and the result of unexcused inaction by the State, it is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2nd Cir.), cert. denied, 396 U.S. 936 (1969). As noted by the Supreme Court of Alabama in its opinion, "unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases." (App. A. p. 11).

SUMMARY OF THE ARGUMENT

1. (1) The Alabama Supreme Court ruled, in accord with Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972), holding that the Respondent was denied his right to a speedy trial based upon an application of the Barker factors to the present case.

(b) The Alabama Supreme Court's holding provides no conflict with United States v. McDonald, 456 U.S. 1, 71 L.Ed.2d 696 (1982), since it is based upon the return of the second indictment as the time period when his right to a speedy trial began.

2. (a) No novel question exists for this Honorable Court to decide; the principles articulated in Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (172), dictate that the State's negligence as a reason for delay, in regards to the right to a speedy trial, should be addressed after indictment or arrest.

(b) The jurisdictions are in accord on the issues of when the right to a speedy trial is triggered: the right begins upon indictment or else the actual restraints imposed by arrest. United States v. Marion, 404 U.S. 307, 320 (1971).

(c) This case involves an individual the State negligently failed to timely serve or arrest, resulting in a prejudicial inexcusable delay depriving the Respondent of his right to a speedy trial. It is not the proper vehicle, should such be necessary, to decide how indictees unarrested, due to their fugitive or unlocatable status, should be handled.

ARGUMENT

I.

THE DECISION OF THE ALABAMA SUPREME COURT IS CONSTITUTIONAL.

The Alabama Supreme Court reversed and rendered the Respondent's conviction, with one justice dissenting, on the basis of the violation of Respondent's right to a speedy trial. The Court, citing United States v. Marion, 404 U.S. 307, 30 L.Ed.2d 468 (1971), holds that the Respondent's right to a speedy trial was triggered when a criminal prosecution began with Respondent's November, 1985, indictment. United States v. Marion, 404 U.S. 307 at 320, 30 L.Ed.2d 468 at 478, (1971). However, while accepting November 18, 1985, as the date when the Respondent's constitutional right to a speedy trial began, the court stated that it was not persuaded that the 1984 dismissal of the charges, and delay of over a year before an indictment was returned, should be completely ignored. The State of Alabama blatantly misstates the Alabama Supreme Court in claiming that the Supreme Court "expressly rejected any suggestion" that the State delayed Respondent's trial in order to gain a prosecutorial advantage. (Pet. at p. 15). The Supreme Court stated as follows:

> "We cannot assume that the indictment was nol prossed to give the state a prosecutorial advantage, but we cannot assume otherwise, either. The record just does not show why the indictment was dismissed on motion of the state and why the state decided to seek indictment again approximately one year later." (App. A, p. 9).

The Supreme Court states that the Respondent and the State of Alabama agree as to when the right to a speedy trial is triggered and also agree that whether Respondent was denied this right must be determined under the four factors of Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972). Applying the Barker factors, length of delay, reason for delay, the defendant's assertion of his right, and prejudice to the defendant, the Supreme Court holds the Respondent was denied his right to a speedy trial.

A.

THE OPINION OF THE ALABAMA SUPREME COURT IS IN ACCORD WITH BARKER V. WINGO, (407 U.S. 514 [1972])

Despite the Supreme Court's reliance on Barker v. Wingo, supra, the Court's analysis of the four factors and its application of those factors to the present facts, the State of Alabama claims that the Supreme Court's opinion is in conflict with Barker, citing Moore v. Arizona, 414 U.S. 25, 38 L.Ed.2d 183 (1973), the State asserts as follows:

> "In the instant case, the Alabama Supreme Court found prejudice solely, as a practical matter, on the basis of the length of the delay." (Pet. at p. 26).

In so stating, the State of Alabama misunderstands both the law of Moore and the Alabama Supreme Court's opinion. Prejudice is merely one of the four considered factors; the length of the delay is a separate factor and is of no more or less than equal significance. It is the State, and not the Supreme Court, that

misapplies the law by attaching controlling significance to the fourth factor, prejudice, and by ignoring the other three.

Consistent with the Alabama Supreme Court's reasoning and holding, an accurate reading of Barker v. Wingo, supra, and analysis of the "four factors," in light of the facts, reveals the following:

> (1) the length of the delay, from indictment to arrest, was unreasonable and presumptively prejudicial,
>
> (2) the reason for the delay was the State's inexcusable negligence,
>
> (3) the Respondent properly asserted his right at the earliest opportunity, and
>
> (4) the Respondent was prejudiced by a loss of memory coupled with excessive delay and unexcused inaction. (App. A at p. 8-12).

The State, in its concentration of the fourth factor, misstates the facts in claiming the Respondent contradicted himself on cross-examination. (Pet. at p. 27). The Respondent stated he remembered the accusations and his part in the offenses, but did not remember everything that had happened or all of his statements to police officers. (TR. pp. 6-7). It is unreasonable to expect anything else after four years had passed, a fact in part reflected in this Honorable Court's concern that delay would impair the defense. Barker v. Wingo, 407 U.S. 514 and 532, 33 L.Ed.2d 101, 118 (1972). The State, however, permits itself to speculate about the impairment of the Respondent's memory, again misstating the facts, by claiming Respondent testified he forgot "everything." (Pet. at p. 27). The record

clearly indicates that Respondent made no such claim. (TR. pp. 6-7). Finally, the State asserts that the other factors "have no possible application," (Pet. at p. 28), except to a possible period of nine months calculated by the Petitioner from Respondent's initial 1984 arrest to dismissal and his 1987 arrest to his first guilty plea. Even by its own reasoning, the State contradicts itself. The remaining period is dismissed because the indictment was withheld from the public and the Respondent knew nothing of it; the Petitioner chooses to ignore the period following the Respondent's first guilty plea and the possibility of memory loss impairing the defense.

Finally, the State misstates again the Alabama Supreme Court in claiming that court held a forty-four (44) month delay is per se so prejudicial as to outweigh all other considerations. (Pet. at p. 29). The court neither based its holding on a forty-four (44) month period nor outweighed the other factors. The period was thirty-four (34) months and, as a reading of that opinion clearly reveals, each factor was weighed and analyzed. (App. A at pp. 4, 8-12).

No manifest conflict exists between this Honorable Court's holdings and that of the Alabama Supreme Court. Thus, the writ should be denied.

B.

NO CONFLICT WITH UNITED STATES V. MCDONALD, (456 U.S. 1 [1982]), EXISTS.

Because the Alabama Supreme Court based its holding on its

acceptance of the returning of the indictment as the date when the Respondent's right to a speedy trial began, no conflict exists with United States v. Jeffrey McDonald, 456 U.S. 1, 71 L.Ed.2d 696 (1982). Therefore, the writ cannot issue on these grounds.

II.

NO NOVEL QUESTION, CONFLICT AMONG THE JURISDICTIONS, OR SPECIAL REASONS EXIST TO JUSTIFY GRANTING OF THE WRIT.

A.

NOVEL QUESTION

The State of Alabama submits that this Honorable Court should grant the writ in order to answer in the negative the question of whether the time during which an indictee cannot be located is subject to speedy trial analysis.

The State, in so framing the issue, asks this Court to go beyond the facts of this case. The Respondent could have been located quite easily, and would have been, avoiding these subsequent lengthy appeals, but for the State's negligence.

Further, the State is submiting that such negligence, the reason for the delay, should not be addressed by any court. It simply should not be counted, the State asserts, if the individual has not been arrested, ignoring the fact that in this case, the Respondent was not timely arrested due to the State's negligent failure to do so. Such reasoning clearly flies in the

face of Barker v. Wingo, supra, and the principles articulated therein, and does not provide a novel question requiring the granting of the writ.

B.

CONFLICTS AMONG THE JURISDICTIONS

The State of Alabama suggests that a conflict among the jurisdictions exists regarding whether or not time between indictment and arrest should count for speedy trial purposes. In advancing it's theory, the State correctly notes that most state courts, including the Alabama Supreme Court and the United States Court of Appeals, have held that indictment or arrest triggers the speedy trial right. (Pet. at pp. 33, 34, 36, and 37).

The Petitioner relies heavily on United States v. Hay, 527 F.2d 990 (10th Cir. 1975), cert. denied, 425 U.S. 935, 48 L.Ed.2d 176, 96 S.Ct. 1666. That court held that delay between the time of indictment and defendant's arrest could not be considered in determining a speedy trial claim because this defendant was not available for prosecution. The court further held that an analysis of the Barker v. Wingo four factors revealed that the seventeen (17) month delay in this complex conspiracy case was outweighed by the government's legitimate reasons for delay, such as obtaining a material witness. United States v. Hay, 527 F.2d 990 at 994. The Hay court cited Barker v. Wingo as follows in a footnote:

> "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker v. Wingo, 407 U.S. 514, 531, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972).

United States v. Hay, 527 F.2d 990, 994. The Hay court also noted that, unlike the Respondent's case, the government discharged its "constitutional duty to make a diligent, good-faith effort" (citations omitted) to bring the defendant to trial. Id, at 996. Finally, the Hay court held:

> "Preventing this harm (of restricting the defendant) is a primary concern of the speedy trial guarantee, Moore v. Arizona, 414 U.S 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); Barker v. Wingo, supra, but it is not as important a consideration as impairment of the defense function. . . United States v. Detienne, 468 F.2d 151 (7th Cir. 1972), cert. denied, 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274." (Emphasis added).

Id. at 996.

Thus, the Hay court's reasoning clearly contradicts the State's reliance on it and the State's argument that pre-arrest post-indictment delay ought to be ignored because the defendant is not restricted and may not be anxious or scorned. Indeed, the court seems to answer the State's issue in its reasoning as noted above.

Likewise, in United States v. Watson, 599 F.2d 1149 (2nd Cir. 1979), the government acted in good faith in attempting to find defendantsand bring them to trial, a different setting than that of Respondent. United States v. Watson, 599 F.2d 1149, 1153.

The State's argument, despite myriad court holdings that the right to a speedy trial begins at indictment or arrest, that a conflict exists among the jurisdictions, is based upon the

State's misperception of the law governing the Sixth Amendment right to a speedy trial. Barker v. Wingo addresses the issue most adequately. The concerns behind the right to a speedy trial are not simply the defendant's restriction and anxiety so stressed by the state; other concerns include:

(1) the societal interest in avoiding a large backlog of cases,

(2) persons awaiting trial can commit other crimes,

(3) the possibility of escape of the accused,

(4) witnesses memories fade, and

(5) society's duty to swiftly prosecute.

Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101 (1972). The State's argument completely ignores these and other concerns not persuasive to its case.

No conflict exists among the jurisdictions sufficient to justify granting of the writ. The jurisdictions are in agreement that the right to a speedy trial begins at indictment or arrest.

C.

SPECIAL REASONS

The State of Alabama states that the writ should issue in order for this Honorable Court to address what should be done about unexecuted warrants in cases such as fugitives avoiding discovery and persons who cannot be located. The State characterizes this as "delay occasioned by unsuccessful efforts to locate and arrest" these individuals and states that this

Honorable Court has never examined this issue. (Pet. at p. 40).

First, the issue as stated by the State, is irrelevant for purposes of the State's petition. The Respondent was not a fugitive or person who could not be located; the delay in his case resulted from the State's negligence, not unsuccessful efforts to locate him.

Second, the issue of fugitives and those who cannot be found after due diligence is logically addressed under the second Barker factor, reasons for the delay, when it is factually appropriate.

Third, the starting point for attachment of Respondent's speedy trial rights is, and must be, upon his indictment for this fundamental right to retain any meaning.

Lastly, the State suggests that we mustn't second guess the State in its efforts, or lack thereof, to serve this Respondent or any other individual. After all, the State asserts, they could always do more. (Pet. at p. 41). This nonpersuasive reasoning would permit the State, literally, to do nothing. The Petitioner even equates the negligence in this case with failure to find and serve a fugitive or unlocatable indictee. The Respondent was neither; the State's argument must fail on this and its other points.

It is respectfully submitted that no reasons sufficient to justify the grant of this writ have been asserted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS M. HAAS
N. RUTH HAAS
Attorneys for Respondent
258 State Street
Mobile, Alabama 36603
(205) 432-0457

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the Honorable Joseph Marston, Assistant Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130, by depositing a copy of same in the United States mail, properly addressed and postage prepaid on this the 4th day of December, 1990.

THOMAS M. HAAS

APPENDIX

MAY 11 1990

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

Ex parte Jerry Ray Carrell

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Jerry Ray Carrell

88-1549 v.

State)

(Mobile Circuit Court, CC-87-2103 through -2105)

MADDOX, JUSTICE.

The sole issue presented in this case is whether the defendant's right to a speedy trial was violated.

This Court granted the defendant's petition for a writ of certiorari to the Court of Criminal Appeals, which had affirmed the defendant's convictions in the Mobile County Circuit Court for two counts of first degree sexual abuse and one count of second degree sexual abuse. The Court of Criminal Appeals did not issue an opinion in the case, see [Ms. 1 Div. 842, June 30,

1989] ___ So.2d ___ (Ala. Cr. App. 1989); therefore, we are unaware of the reasons why that Court denied defendant any relief.

In regard to any claim by a defendant that his constitutional right to a speedy trial has been violated, a court must look at the specific facts and circumstances surrounding the particular claim and apply the four-part test set out in the landmark case of Barker v. Wingo, 407 U.S. 514 (1972). Barker sets out these determinative factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant resulting from the delay.

FACTS

The facts are as follows: Defendant was initially arrested in August 1984, based on an indictment charging him with the same offenses that form the basis for his convictions in these cases. He appeared in court to answer the charges in September 1984, but at that time the charges were nol prossed on motion of the State. After those first charges were dismissed, the following events transpired:

November 18, 1985	Defendant reindicted by the November 1985 Grand Jury of Mobile County for two (2) counts of first degree sexual abuse and one (1) count of second degree sexual abuse.

November 19, 1985	Sheriff's Department's first attempt to serve the Defendant.
March 1987	Second attempt by Sheriff's Department to locate defendant.
August 6, 1987	Defendant arrested for the charges in the indictment at the place where he had worked for 18 years, and where he had been arrested on the 1984 indictment that were nol prossed.
August 17, 1987	Defendant entered a written plea of not guilty and waived arraignment.
September 4, 1987	Defendant entered a plea of not guilty by reason of a mental defect.
September 16, 1987	Defendant filed a motion to dismiss and demanded a speedy trial.
January 8, 1988	Hearing on motion to dismiss held and motion taken under submission.
February 11, 1988	Motion to dismiss denied.
April 7, 1988	Defendant entered a plea of guilty.[1]

---

[1]The plea of guilty was entered without the defendant's waiving his right to appeal in regard to his "speedy trial" claim. The record shows the following:

"Friday, May 6th, 1988

"This day in open court came the State of Alabama by its District Attorney and thereupon in open court on this day; It is ordered by the Court that the Order of April 7th, 1988, be and the same is hereby amended EX [MERO MOTU], and by agreement of parties, to include defendant's reservation of his right to appeal the

May 18, 1988	Defendant filed motion for a new trial in which he alleged: "The parties have agreed that the Defendant may take an appeal of the denial of the court of the Defendant's Motion to Dismiss, and the record is unclear on this matter."
July 1, 1988	Motion for new trial granted.
July 1, 1988	Defendant entered guilty plea to the charges. Defendant was convicted.
September 1, 1988	July 1 conviction set aside, defendant pleaded guilty and upon conviction reserved right to appeal denial of motion to dismiss and defendant gave oral notice of appeal, as follows: "And thereupon in open court at the time of sentence, the defendant gave oral notice of appeal of the [c]ourt's previous ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, 1987, and moved the court to suspend the execution of the sentence pending appeal, and to fix the amount of an Appeal Bond."
September 8, 1988	Defendant filed a written notice of appeal in all three cases.

It is apparent from the facts set out above that defendant's convictions of sexual abuse came almost three years after the return of the second indictment against him by the

---

Court's ruling of February 11th, 1988, denying defendant's Motion to Dismiss filed September 16th, [1987]."

grand jury, and more than four years after the initial indictment had been returned and the defendant had been arrested thereon.

It is apparent from the record in this case that the defendant, shortly after his arrest on the second indictment, filed a motion to dismiss, in which he included as a ground for dismissal the allegation that his right to a "speedy trial" had been denied. The defendant asks this Court to review only the trial court's denial of his motion to dismiss the indictment on the "speedy trial" ground. While the defendant's convictions were based upon his entry of pleas of guilty to the charges, the record clearly shows that the trial judge, the district attorney, and the defendant all understood that he had the right to appeal the denial of his "speedy trial" claim.

It is apparent that defendant's conviction occurred more than four years after he was initially indicted on the charges.

He was arrested on the original indictment shortly after its return, at his place of employment in August 1984. As the facts set out above show, those charges were nol prossed on motion of the State's attorney in September 1984, and the defendant was not reindicted until November 18, 1985, over one year later.

The record shows that within a week of the return of the second indictment, the sheriff's department first attempted to serve it upon the defendant and to arrest him. According to

testimony of sheriff's deputies, the sheriff returned the warrant because the address of defendant on the arrest warrant was inaccurate.[2] The record also shows that the sheriff had a task force that made an attempt to serve all outstanding arrest warrants, including the defendant's, during the latter part of 1986 and the early part of 1987.[3] The sheriff's justification for not finding the defendant was based on a claim that the address on the warrant was for a house number on Dewitt Street and that the numbering system on that street had been changed, and, although defendant had not moved, the house number may have changed.[4] There was no evidence presented to indicate that the defendant attempted to avoid service of the warrant, and the State does not attempt to justify the delay on this ground.

---

[2]There is nothing in the record to indicate that the petitioner was living in a different house or had attempted, in any manner, to avoid service, and the petitioner testified that he did not know that the indictments had been returned until he was arrested upon them in August 1987.

[3]There is some evidence that there may have been an attempt to serve this indictment in March 1987. The record is silent regarding the person or persons responsible for getting an address on the arrest warrant, or for checking with complaining witnesses to learn the whereabouts of the petitioner.

[4] The appellant had moved at one point from his mother's house to the house next door, but neither address was the one shown on the warrant, and there is nothing in the record to indicate why the officers of the State responsible for getting the correct address of persons charged in outstanding indictments were unaware of governmental action that may have changed the numbering scheme on Dewitt Street or that defendant was arrested on the first indictment at his place of employment.

On August 7, 1987, the defendant was arrested at his place of employment. This was the same place of employment at which he had been arrested by the sheriff in 1984.[5]

THE RIGHT TO A SPEEDY TRIAL

The State and the defendant agree on one point of law: The right to a speedy trial is triggered when a criminal prosecution has begun. Hayes v. State, 487 So.2d 987 (Ala.Cr.App. 1986), citing United States v. Marion, 404 U.S. 307 (1971), in which the United States Supreme Court stated, inter alia:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."

United States v. Marion, 404 U.S. 307 at 320 (1971). We agree with the State that the defendant's right to a speedy trial was not triggered by the return of the 1984 indictment, because those charges were nol prossed by the State, but we are not persuaded that the dismissal of those charges, and the delay of over a year before the new indictment was returned, should be completely ignored.[6]

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[5]The record does not show why the sheriff had not attempted earlier to serve the second indictment on the defendant at the same place where the sheriff had served him with the first indictment.

[6]The record in this case does not show why that first indictment was nol prossed, but if it was nol prossed in order to give the State a prosecutorial advantage, then it would not be completely clear that the delay should not be counted in the

In order to decide the precise issue presented by this petition, we accept November 18, 1985, as the date when the defendant's constitutional right to a speedy trial began; that was the date when the second indictment was returned. Although defendant was never tried, because he entered a plea of guilty, with leave to appeal his "speedy trial" claim, we consider that he was "tried" as of the date when he was convicted and sentenced on his plea of guilty on September 1, 1988.

The State and the defendant are in agreement that whether he was denied his right to a speedy trial must be determined in accordance with the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), that is, (1) the length of the delay, (2) the reasons for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant resulting from the delay.

Applying these factors to the present facts, we find that the defendant was denied the right to a speedy trial.

(1) Length of delay. Whether the length of delay violates the right to a speedy trial is "necessarily dependent upon the peculiar circumstances of the case." Barker v. Wingo, 407 U.S. at 530, 531. Although the Barker Court recognized that the complexity of the charge would have a bearing on whether the length of delay was reasonable, we find that the offenses

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total. Petitioner contends that this period of delay should be counted, but cites no authority and presented no evidence other than the fact that the original charges were nol prossed.

charged here are not unusually complex, and should not have required any extra preparation time beyond the time normally allotted to the State to prepare a case. Consequently, we find that under the facts of this case, the delay in this case was presumptively prejudicial.

(2) Reasons for the delay. It is clear from the facts presented here that the defendant has not shown that the State deliberately delayed his trial in order to gain a prosecutorial advantage.[7] The State argues that the delay was justified because the address on the arrest warrant was incorrect. Defendant argues that the evidence clearly shows that he lived at the same place where he lived when the first indictment was returned, and that he worked at the same place where he was arrested on the first indictment, and that the record is devoid of any evidence that he deliberately attempted to avoid service of the warrant. We interpret the evidence the same way. The delay, of course, was caused by the failure of the State to serve the arrest warrant on the defendant. The State argues that the delay was justified in this case because the sheriff's department diligently tried to serve the warrant on the

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[7]Defendant does argue that the length of delay from the time of the return of the first indictment should be counted, but defendant has not shown the reasons why the State nol prossed the first indictment. We cannot assume that the indictment was nol prossed to give the State a prosecutorial advantage, but we cannot assume otherwise, either. The record just does not show why the indictment was dismissed on motion of the State and why the State decided to seek indictment again approximately one year later.

defendant. We cannot excuse so easily the failure of the State to serve the warrant. The facts show that the defendant was finally arrested by the sheriff's department at his place of employment. He had been employed there for 18 years and had been arrested there by someone in the sheriff's department three years before on the same charges. Also, although it is not clear how the improper address was placed on the warrant, it is clear that this was not the fault of the defendant. The failure of the sheriff to serve the warrant was caused by the State's failure to ascertain the whereabouts of the defendant, who admittedly was not trying to evade service of process. The evidence shows that officers of the State responsible for discovering the place where defendant could be found did not attempt to find the defendant's former or present address or to make any attempt to locate him at his place of employment where he had been located before. We think this constitutes negligence by the State, and although negligence is not weighed as heavily against the State as deliberate delay, it nevertheless must be weighed against the State. Taylor v. State, 429 So.2d 1172 (Ala.Crim.App. 1983), cert. denied, 464 U.S. 950 (1983); consequently, we find that the State's neglect to arrest the defendant in this case in a timely manner is weighty enough to raise a presumption of prejudice to the defendant in this case.

(3) The defendant's assertion of his right. The defendant timely asserted his rights in this case by filing his motion to

dismiss demanding a speedy trial approximately five weeks after his arrest. He testified that, prior to his arrest, he did not know that the charges were outstanding, and there is absolutely no evidence that he knew that he had been reindicted on the same charges that had been previously dismissed.

(4) Prejudice to the defendant. The defendant contends that he was prejudiced by the delay because, he says, his memory has faded. Although ordinarily a mere assertion of a loss of memory is not enough of a showing of prejudice to support a finding that a defendant has been denied due process, where the delay is excessive and is the result of unexcused inaction by the State, the delay is prima facie prejudicial. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88 (2d Cir.), cert. denied, 396 U.S. 936 (1969). We find that the delay in this case was of such length that defendant's right to a speedy trial has been violated. While the record does not show why the initial charges were dismissed, it would appear that defendant, at the time of the dismissal, had a right to assume that he would not be charged again, and unexcused inaction in a case involving alleged sexual misconduct involving children could be especially prejudicial to a defendant, because the prosecution must depend on the testimony of the alleged victims in many cases. Defendant entered a plea of guilty with a reservation of his right to insist on his "speedy trial" claim; the validity of that claim does not depend

upon whether he is guilty or not guilty of the charges levied against him. The right to a speedy trial is a right guaranteed to every citizen by the state and federal constitutions and it acts as a limitation on State or Government action without regard to the guilt or innocence of the defendant, and in that regard is not unlike the right of a defendant to have illegal drugs excluded from evidence because they were obtained unconstitutionally by State or Government action.

Based upon the above, we find, under all the facts and circumstances of this case, that the defendant was denied his right to a speedy trial. In making this determination, of course, we do not decide whether the defendant is guilty of the charges levied against him. The judgments are, therefore, reversed and rendered.

REVERSED AND RENDERED.

Hornsby, C.J., and Jones, Adams, Houston, and Kennedy, JJ., concur.

Shores, J., dissents.